Petition

81-925

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No. 81- _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

Maine Caterers, Inc. and
W.H. Maine, Inc.

Petitioners,

-v.-

National Labor Relations Board,

Respondent.

Brotherhood of Industrial Caterers,

Intervenor.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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No. 81-____

IN THE

SUPREME COURT OF THE UNITED STATES

Maine Caterers, Inc. and
W.H. Maine, Inc.

Petitioners,

-v.-

National Labor Relations Board,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Now come the Petitioners, Maine Caterers, Inc. and W.H. Maine, Inc. and pray that this Honorable Court issue a Writ of Certiorari to review the opinion and decree of the United States Court of Appeals for the First Circuit, entered on July 16, 1981, affirming and enforcing the application for enforcement made by the National Labor Relations Board against Petitioners here.

QUESTION PRESENTED

Does the statutory exemption for independent contractors exclude the driver/salespersons who are the subject of the National Labor Relations Board's enforcement action

from the coverage of the National Labor Relations Act?

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CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals in the case of National Labor Relations Board v. Maine Caterers, Inc., 561 F.2d 57 (1st Cir., 1981), is appended hereto at pages 1a-7a.

The decision and order of the National Labor Relations Board in the case of Maine Caterers, Inc., et al. and Brotherhood of Industrial Caterers, 251 NLRB No. 91, 8-25-80, is appended hereto at page 9a-26a.

The decision and direction of election of the Regional Director of the NLRB in the case of Maine Caterers, Inc. and W.H. Maine, Inc. and Brotherhood of Industrial Caterers, Case No. 1-RC-16,143, April 5, 1979, is appended hereto at pages 27a-40a.

JURISDICTIONAL STATEMENT

The decision of the United States Court of Appeals of which Petitioners seek review was rendered on July 16, 1981, and the decree was entered on the same day. A copy of said decree, affirming and enforcing the National Labor Relations Board's application for enforcement, is appended hereto at page 8a.

On October 9, 1981, this Honorable Court

issued an order granting an extension of time to November 15, 1981, within which to petition for certiorari in the instant action.

The jurisdiction of this Honorable Court to review the decision of the United States Court of Appeals upon a Writ of Certiorari is conferred by 29 U.S.C. §160(e) and (f).

CITATIONS TO RELEVANT STATUTES

29 USCS §152

When used in this Act [29 USCS §§151-158,159-168]-...

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise,and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 USCS §§151-163, 181-188], as amended from time to time, or by any other person who is not an employer as herein defined.

29 USCS §157

§157. Rights of employees. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the

extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section (8)(3) [29 USCS §158(a)(3)]. (July 5, 1934, c. 372, §7, 49 Stat. 452; June 23, 1947, c. 120, Title I, §101 in part, 61 Stat. 140.)

STATEMENT OF THE CASE

Maine Caterers, Inc. and W.H. Maine, Inc., Petitioners herein, seek review by this Court of the standard and scope of the exemption found within the Labor Management Relations Act, [hereinafter, the Act] 29 U.S.C. §141, et seq. pertaining to independent contractors. Specifically, the United States Court of Appeals for the First Circuit, pursuant to the authority granted it by 29 U.S.C. §§160(e) and (f), has held that the exemption excluding independent contractors from the Act's coverage does not apply to a certain group of driver/salespersons. Rather, it found such driver/salespersons to be within the scope of the Act's definition of "employee." 29 U.S.C. §152(3), supra.

Maine Caterers, Inc. [hereinafter, Maine] is a corporation, located in the State of Rhode Island, and engaged in the manufacture of packaged food products for resale to various industrial customers and consumers. The salespersons who service the industry and consumer purchasers employ catering trucks which are owned by W.H. Maine, Inc. [hereinafter, W.H.].

Each driver salesperson whose relationship to Maine and W.H. is at issue had previously entered into a written contract whereby he or she agreed to pay a daily rental fee

of $17.00, in consideration for the rental of a catering truck and an established customer route from W.H. The lease is terminable by either party upon thirty (30) days written notice. The driver/salespersons further agree to purchase all of their supplies from Maine, with the exception of those products they may wish to carry but which are not sold by Maine. The driver/salespersons retain all profits and bear all losses stemming from the sale of their goods.

The contract between the parties further provides that the driver/salesperson shall service the entire route rented from W.H.; shall sell his or her products at reasonably competitive prices; shall be responsible for all taxes, except the motor vehicle tax, arising out of the operation of the route; and shall be responsible for the payment of vehicle maintenance and repair costs. By the terms of the contract, the driver/salesperson is defined as an independent contractor.

Testimony by the parties further establishes that driver/salespersons hire their own employees to service routes which they have rented from W.H.; that they are responsible for obtaining all permits and licenses necessary for the operation of a catering truck; that the advertising on the trucks specifies that they are serviced by Maine

Caterers, Inc. and operated by the driver/salesperson who rents the truck; and that from time to time driver/salespersons vary the prices they charge from those suggested by Maine. Maine trains the driver-salespersons and on occasion, either at the driver/salesperson's request or upon its own initiative, sends a representative to accompany the driver/salesperson and to advise him on the servicing of his route.

Eleven of the driver/salespersons who have contracted with Maine and W.H. seek to bargain collectively with Petitioners. Maine declined to recognize the Brotherhood of Industrial Caterers [hereinafter, Brotherhood] as the exclusive bargaining agent for these driver/salespersons. The Brotherhood accordingly filed a charge and the National Labor Relations Board [hereinafter, the Board] issued a complaint alleging that Maine and W.H. had engaged in unfair labor practices affecting commerce. The hearing with regard to this matter was transferred to a three member panel of the Board, which held that Maine and W.H. were, by refusing to bargain collectively with the Brotherhood, engaged in unfair labor practices, in violation of the National Labor Relations Act, 29 U.S.C. §151 et seq. 1/

1/ The decision and order of the Board, reported at 251 NLRB 91, is appended hereto at

Maine and W.H. subsequently filed a Petition for Review of the Board's decision, and the Board filed an Application for Enforcement of the Board's Order in the United States Court of Appeals for the First Circuit. This Petition for a Writ of Certiorari seeks review of the resulting decision of the United States Court of Appeals. 2/

pages 9a-26a.

2/ The opinion of the United States Court of Appeals, reported at 651 F.2d 57, is appended hereto at pages 1a-7a.

ARGUMENT

Petitioners assert that the United States Court of Appeals for the First Circuit have misconstrued the indicia of employee, as opposed to independent contractor, status for the purpose of the Labor Management Relations Act, supra. Furthermore, the First Circuit's interpretation of the relevant definitions and scope of the Act conflict with the decisions of various other Courts of Appeal. National Labor Relations Board v. Amber Delivery Service, Inc., 651 F.2d 57, (1st Cir., 1981); National Labor Relations Board v. A. Duie Pyle, Inc., 606 F.2d 379, (3rd Cir., 1979); Local 777, Democratic Union Organizing Committee, Seafarers' Int'l. Union of North Am., AFL-CIO v. National Labor Relations Board, 603 F.2d 862 (D.C. Cir., 1979); Frito-Lay, Inc. v. National Labor Relations Board, 385 F.2d 180 (7th Cir., 1967).

Congress passed the exemption excluding independent contractors from coverage under the Labor Management Relations Act, supra, as part of the Taft-Hartley amendments of 1947, in direct response to the Board's expansion of the definition of "employee" and to this Court's approval of the Board's interpretation in National Labor Relations Board v. Hearst Publications, 322 US 111

(1944). Indeed, the House Report pertaining to the Taft-Hartley amendment specifically states that Congress intended to limit the scope of the Act's coverage to individuals ordinarily defined as employees.

> "Employee" according to all standard dictionaries, according to the law as the Courts have stated it, and according to the understanding of almost everyone, with the exception of the members of the National Labor Relations Board means someone who works for another for hire. But in the case of National Labor Relations Board v. Hearst Publications, Inc., (322 US 111, 64 S. Ct. 851, 88L.ed. 1170 (1944)), the Board expanded the definition of the term "employee" beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic "expertise" of the Board, upheld the Board...it must be presumed that when Congress passed the Labor Act, it intended words used to have the meanings that they had when Congress passed the Act, not new meanings that, 9 years later the Labor Board might think up. In the law, there always has been a difference, and a big difference, between "employee" and "independent contractors." "Employees" work for wages or salaries under direct supervision. "Independent contractors" undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials and labor and what they receive for the end

> result, that is upon profits.... To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes "independent contractors" from the definition of "employee."

H.R. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947), reprinted in one Legislative History of the Labor Management Relations Act, 1947 at 309 (1948). Clearly, Congress intended no special deference to be given to the Board's interpretation of employee status.

Recently, the United States Court of Appeals for the District of Columbia noted that the inconsistency of the Board's ruling with regard to this issue provides additional rational for according them little deference.

> The Board's treatment throughout the years of the distinction between "employees" and "independent contractors" in the area of vehicular...leasing has been marked by an unusual degree of confusion and vacillation...Not only has the NLRB repeatedly reached diametrically opposite conclusions on the basis of virtually identical fact situations,...but moreover, it has done so in a series of opinions which typically offer no explanation for their result other than a recitation of the pertinent facts...

Local 777, supra, at 869 [citations omitted]. The same inconsistency which characterizes

the Board's determinations with regard to employee, as opposed to independent contractor, status extends to the decisions of the United States Courts of Appeal upon review of the Board's action.

In general, principles of agency law govern the analysis of whether an individual is an employee within the terms of the Act. National Labor Relations Board v. United Ins. Co., 390 US 254, 256 (1968). In determining whether an agency relationship exists, the Courts have developed a "Right to Control" test which has been variously defined by the respective Courts of Appeal.

> We have interpreted common law test of this "right to control" to require an examination of "the type of services rendered, the possibility of realizing additional profits through the exercise of entrepreneurial skill and the ownership and maintenance" of equipment. This inquiry canvasses both "the language of the contract" and "the practice of the parties, the skill required..., the mode of compensation for additional duties, and the methods of applying corrective and disciplinary measures."

Pyle, supra, at 382 (3rd Cir.).

> ...The extent of the actual supervision exercised by a putative employer over the "means and manner" of the workers' performance is the

> most important element to be considered in determining whether or not one is dealing with independent contractors or employees...
>
> "The employer-employee relationship exists only where the person, for whom the work is done, has the right to control and direct the work, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished...It is the right and not the exercise of control which is the determining element."... Control exercised over the "manner and means of performance,"...not merely the economic controls which many corporations are able to exercise over independent contractors which whom they contract,...is the identifying characteristic of an employer/employee relationship.

Local 777, supra, at 873-874, (D.C. Cir.) [citations omitted].

> Thus the Board, in applying the common law test of independence, has looked to the right of control: whether the putative employer has the right to control not only the results sought but also the means by which those results are achieved....It has also looked to the risk of loss and opportunity for profit and to the degree of "proprietary" interest in, for example, a route or a dealership.

Amber, supra, (1st Cir.). It should also be noted that the legislative history of

the Taft-Hartley amendment, supra, also sets out criteria distinguishing employees from independent contractors. Petitioners assert that neither the Courts of Appeal nor the NLRB have defined or applied the statutory distinction between employees and independent contractors in an intelligible or consistent manner. In Pyle, supra, for example, the United States Court of Appeals for the Third Circuit held that a group of truck owner-operators engaged by a common carrier, A. Duie Pyle [hereinafter Pyle] were independent contractors for purposes of the Act. The owner-operators owned and maintained the vehicles, leased them to Pyle under an agreement terminable upon notice by either party, transported loads in consideration of seventy-five (75%) per cent of the revenue of the shipment, and hired additional drivers of their own choosing. Pyle inspected the vehicles for safety, maintained daily logs, assumed control of the vehicles while in the company's service, and handled all customer relations. The Third Circuit, in denying the Board's petition for enforcement, held that there was not substantial evidence that the owner-operators were employees, and that "in the NLRB's treatment of the statutory exemption, the Board's 'application of the law to the facts overlooked accepted principles of the law of agency...'" Id. at 387 [citations omitted].

Likewise, in Frito-Lay, supra, the United States Court of Appeals for the Seventh Circuit held that distributors of Frito-Lay products were not employees under the terms of the Act. In that case, the distributors owned and maintained their own trucks, hired helpers, were dependent on profits derived from the sale of goods they had purchased from Frito-Lay, and set their own hours and days of work. Frito-Lay required the submission of route cards, followed up on the distributor's new accounts and account losses, accompanied distributors on their routes to assist in sales and offer suggestions, and provided suggested wholesale prices. In granting Frito-Lay's petition to satisfy the Board's order, the Court emphasized the distributor's reliance on profits as their sole compensation, as well as their ability to hire assistants.

Many of these factors also exist in the relationship between Maine and W.H. and the subject driver/salesperson. In particular, it is undisputed that the driver/salesperson relies solely on profit and bear the entire risk of loss as a result of their transaction with customers, and that they have the right to hire assistants to handle their routes for them. In spite of these indicia of independent contractor status, the First Circuit relied

instead on Maine's involvement with the catering routes, its price suggestions, and W.H.'s ownership of the catering trucks in ruling that the driver/salespersons are employees under the terms of the Act. The First Circuit's reliance on these criteria is misplaced.

> Obviously, the chief concern of the company as well as the distributors was in the end result, that is, the sale by the distributors of the products which they had purchased from the Company. This must be so because the well-being of the Company depended entirely upon the sales volume. Likewise, the distributors received no wages but were dependent entirely upon profits derived from the sale of the products which they had purchased from the Company.

Frito-Lay, supra, at 184. The Court in Frito-Lay, more reasonably found the manufacturer's suggestions with regard to sales and promotions as directed toward the end result of sales volume as opposed to the means by which such result was produced. Petitioners assert that some involvement by the manufacturer in overseeing the distribution of its products is not enough to bring the distributors within the scope of the Act's definition of employee, particularly in light of the existence of other indicia of independents. Finally, the First Circuit has declined to grant the same weight to vehicle ownership by drivers in two previous cases, Amber, supra, and

Seven-Up Bottling Company v. National Labor Relations Board, 506 F.2d 596 (1st Cir., 1974).

In light of the Board's renewed expansion of the definition of employee, the absence of comprehensible standards for distinguishing between employee and independent contactor status and the inconsistency among and within the United States Court of Appeals with regard to this issue, Petitioners here respectfully request that this Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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November 10, 1981

APPENDIX

United States Court of Appeals
For the First Circuit

No. 80-1778

NATIONAL LABOR RELATIONS BOARD,

PETITIONER,

v.

MAINE CATERERS, INC., ET AL.,

RESPONDENTS.

BROTHERHOOD OF INDUSTRIAL CATERERS,

INTERVENOR.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

[251 N.L.R.B. No. 91 (1980)]

Before COFFIN, *Chief Judge*,
CAMPBELL and BREYER, *Circuit Judges*.

James Y. Callear, Attorney, with whom *William A. Lubbers*, General Counsel, *John E. Higgins, Jr.*, Deputy General Counsel, *Robert E. Allen*, Acting Associate General Counsel, *Elliott Moore*, Deputy Associate General Counsel, and *William Wachter*, Attorney, were on brief, for petitioner.

Amato A. DeLuca, with whom *Revens & DeLuca, Ltd.* was on brief, for respondents.

July 16, 1981

BREYER, *Circuit Judge*. The sole issue in this case is whether a group of "driver-salesmen" are employees or independent contractors. The National Labor Relations Board found that they were employees. We agree and enforce the Board's order.

The respondents are two closely related industrial caterers. One of them, Maine Caterers, Inc., makes meals, sandwiches, coffee, and similar items for sale at industrial plants during lunchtime and coffee breaks. The other respondent, W. H. Maine, Inc., leases trucks and customer routes to driver-

salesmen who sell Maine Caterers, Inc. products. These driver-salesmen voted nine to one to be represented by a union. The Board found that, for purposes of collective bargaining, the two companies constituted one employer ("Maine"),[1] and it ordered Maine to bargain. We find sufficient evidence in the record to support the Board's conclusion.

The result in this case flows directly from two of our cases: *Seven-Up Bottling Co.* v. *NLRB*, 506 F.2d 596 (1st Cir. 1974), and *NLRB* v. *Amber Delivery Service, Inc.*, No. 80-1623 (1st Cir. June 11, 1981). Most recently in *Amber* we stated the relevant principles of law as follows:

> It is well-established that general principles of agency law govern the distinction between employee and independent contractor for purposes of the Act. *E.g.*, *NLRB* v. *United Ins. Co.*, 390 U.S. 254, 256 (1968); *Seven-Up Bottling Co.* v. *NLRB*, 506 F.2d 596, 597 (1st Cir. 1974). The House Report on the legislation specifically excluding "independent contractor" from the definition of "employee" outlined this distinction as follows:
>
> > "Employees" work for wages or salary under direct supervision. "Independent contractors" undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits.
>
> H.R. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947), *reprinted in* 1 Legislative History of the Labor Manage-

[1] Both companies are owned and controlled by William Maine with the assistance of his brother, Henry. Respondents have not challenged the Board's finding that Maine Caterers, Inc. and W. H. Maine, Inc. constitute a single employer for purposes of Board jurisdiction. *See Radio & Television Broadcasting Technicians, Local 1264* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965). For convenience, respondents are collectively referred to as "Maine".

ment Relations Act, 1947, at 309 (1948). Thus the Board, in applying the common law test of independence, has looked to the right of control: whether the putative employer has the right to control not only the results sought but also the means by which those results are achieved. *E.g.*, *Merchants Home Delivery Service, Inc.* v. *NLRB*, 580 F.2d 966, 973 (9th Cir. 1978); *Seven-Up Bottling Co.* v. *NLRB.*, 506 F.2d at 597-98; *News Syndicate Co.*, 164 N.L.R.B. 422, 423 (1967). It has also looked to the risk of loss and opportunity for profit and to the degree of "proprietary" interest in, for example, a route or dealership. *E.g.*, *Brown* v. *NLRB*, 462 F.2d 699, 705 (9th Cir.), *cert. denied*, 409 U.S. 1008 (1972); *El Mundo, Inc.*, 167 N.L.R.B. 760, 761 (1967); R. Gorman, Basic Text on Labor Law 30 (1976). The determination of "independence", however, ultimately depends upon an assessment of "all of the incidents of the relationship...with no one factor being decisive." *NLRB* v. *United Ins. Co.*, 390 U.S. at 258; *see* Restatement (Second) of Agency § 220 (1957). Our task on review is to ascertain whether the Board's evaluation of such factors is "supported by substantial evidence when viewed in light of the entire record, including the evidence opposed to the Board's position." *Seven-Up Bottling Co.* v. *NLRB*, 506 F.2d at 600. So long as the Board's position represents a "choice between two fairly conflicting views", it should be enforced even if this court "would justifiably have made a different choice had the matter been before it *de novo.*" *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951), *quoted in NLRB* v. *United Ins. Co.*, 390 U.S. at 260.

Id., slip op. at 5-6.

There is considerable evidence here that Maine has the "right to control not only the results sought but also the means by which those results are achieved". *Id.*, slip op. at 5. The

salesmen are first trained as salaried drivers. Henry Maine, one of Maine's owners, shows them "exact procedures" for running a Maine catering truck. These include the time to appear at each stop, the method of display, the manner to use with customers, and the proper method of driving. After training, the driver is no longer salaried, but Maine continues significant supervision. Maine does not allow use of the truck for other than serving Maine customers. Maine may add or subtract particular customers to or from a driver's route. Maine coordinates the time of serving any added customers with the driver's existing schedule. Maine supervises the driver's maintenance of the truck and its cleanliness. There is evidence that, at times, Henry Maine accompanies a driver on his route, checking the driver's stops and times, the driver's prices, the manner of food display, and the way in which the driver presents himself to the customers. Henry Maine has at times visited customers to settle problems. The written contract between the driver and Maine requires the driver to serve his entire route each business day and forbids him from deviating from the route or omitting services. It forbids him from serving anyone other than Maine's customers. It requires him to buy all "food, beverages, supplies and sundries" from Maine. And, Maine's interest in the manner of route service is enforced by the fact that the contract allows Maine (as well as the driver) to terminate the contract for any reason upon thirty days notice.

If one looks to "the degree of 'proprietary' interest in . . . a route," *id.*, one finds that the driver has no interest whatsoever in his route. All routes are the property of Maine. Any additional customers found by the driver become the property of Maine. And, under the contract, should the driver leave Maine's service, he could not engage in industrial catering in Rhode Island for two years.

The major difference from *Amber* arguably lies in the area of "risk of loss and opportunity for profit". Unlike in *Amber*,

the drivers here allegedly sell at prices set, not by Maine, but by themselves. They buy their supplies from Maine and resell them; thus they bear the risk of bad debts, spoilage, and theft. Moreover, their compensation comes from the difference between their purchase price and their resale price. Maine does not pay them salaries or provide fringe benefits or withhold taxes or social security. The drivers also have the right to hire substitutes—though there is evidence that the substitutes had to meet with Maine's approval.[2]

These factors are not controlling, however, for two reasons. First, there is evidence that the drivers' control of prices was limited. The contract provides that the driver "shall set the products purchased by him at reasonably competitive prices as suggested by [Maine] from time to time". Maine prints menus with prices, which are distributed to customers and posted on the trucks. Since a customer may be served by more than one driver-salesman during the course of the day, Maine is particularly interested in keeping prices uniform. Henry Maine has told at least one driver to reduce a price that he was charging on an item. Driver Michael J. Grady testified concerning Henry Maine's supervision and the "strongly suggested" prices:

> Sometimes [Henry Maine] would come along with me because I would ask him to come along. And, other times he would request it for what appeared to me to be supervisory reasons, such as: he would stand there and he would check my totals—if I was totaling a particular group of food that a customer was buying. He would sample my food. Check my appearance and make sure my truck was in proper operating procedure. He would make suggestions as to how I should improve it or change my operation around.
>
> Q. Did he ever tell you that you were charging too much for your goods?

[2] And in both cases the contract provides that no employer-employee relationship exists.

A. At times....

....

Q. Now, can you explain to us, in your own mind did you feel that these suggestions were such that if you didn't follow them, you might be terminated?

(After an objection, which was overruled.)

A. Yes.

Q. Why did you feel that way?

A. Because of a combination of—it was strongly suggested and you would go along with the suggestion. If you don't go along with the suggestions—okay? You run into a certain problem—it would always exist.

In other words, you would feel—I would feel, personally, like you were running into a confrontation constantly if you didn't do that.

In particular circumstances, if I objected strongly to a particular price or something—then personal conversations that existed on a day to day basis would cease—if that's clear?

Second, and more important, here, unlike in *Amber* and *Seven-Up*, the drivers did not own their trucks.[3] They leased the trucks, paying for their gasoline and other maintenance. In *Amber* and *Seven-Up*, we found the fact of truck ownership a significant (though not in itself controlling) factor suggesting independent contractor status. This is not surprising, for a driver who owns a truck has more than his own labor at risk—he also has a capital investment. And, this investment gives him somewhat greater independence (in terms of his ability to find work elsewhere) than were only his own labor at stake. The fact of non-ownership alone, tending to support a

[3] The trucks bear the inscriptions "Serviced by Maine Caterers" and "operated by [driver's name]".

finding of "employee", more than outweighs any minor differences that Maine contends cut in the other direction.[4]

On the basis of this prior authority, the order of the Board is *Enforced*.

[4] Maine seeks to distinguish *Seven-Up* on the grounds that, in contrast to this case, the contracts in *Seven-Up* were oral, Seven-Up billed customers directly, many Seven-Up drivers wore uniforms, Seven-Up set sales quotas, Seven-Up had meetings to discuss sales, Seven-Up conducted surveys to evaluate the distributors, and Seven-Up controlled the size of the territories. The record suggests that as to many of these items, the differences between Seven-Up and Maine are small. As to the others, we believe any differences are outweighed by the fact that in *Seven-Up*, many drivers owned their own trucks, yet we still upheld a Board finding of "employee" status. Here the drivers do not own their trucks.

Adm. Office, U.S. Courts — Blanchard Press, Inc., Boston, Mass.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 80-1778.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MAINE CATERERS, INC., ET AL.,
Respondents,

BROTHERHOOD OF INDUSTRIAL CATERERS,
Intervenor.

DECREE

Entered July 16, 1981

This cause came on to be heard upon application for enforcement of an order of the National Labor Relations Board, and was argued by counsel.

Upon consideration whereof, It is now ordered, adjudged and decreed as follows: The application for enforcement is hereby affirmed and enforced.

By the Court:

DANA H. GALLUP, Clerk

_____

Chief Deputy Clerk.

FJP

251 NLRB No. 91

D--6706
Warwick, RI

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MAINE CATERERS, INC. AND
W.H. MAINE, INC.

and

Case 1--CA--17298

BROTHERHOOD OF INDUSTRIAL
CATERERS

DECISION AND ORDER

Upon a charge filed on March 21, 1980, by Brotherhood of Industrial Caterers, herein called the Union, and duly served on Maine Caterers, Inc., and W. H. Maine, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 1, issued a complaint and notice of hearing on April 22, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an

administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on May 18, 1979, following a Board election in Case 1--RC--16143, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about February 18, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On April 25, 1980, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

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[1] Official notice is taken of the record in the representation proceeding, Case 1-RC--16143, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See LTV Electrosystems, Inc., 166 NLRB 938 (1967), enfd. 388 F. 2d 683 (4th Cir. 1968); Golden Age Beverage Co., 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); Intertype Co. v. Penello, 269 F. Supp. 573 (D.C.Va. 1967); Follett Corp., 164 NLRB 378 (1967), enfd. 397 F.2d 92 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

On May 20, 1980, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on May 30, 1980, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice to Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and in its response to the Board's Notice to Show Cause, Respondent set forth the following defenses: W.H. Maine, Inc., hereinafter referred to as Maine, Inc., is not engaged in commerce within the meaning of the Act; Maine, Inc., and Maine Caterers are not joint employers for the purpose of "Jurisdiction" or "Unit" findings and conclusions under the Act; and the drivers of Maine, Inc., are not employees within the meaning of the Act, but rather new independent contractors.[2]

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[2] Respondent, in its objection to the Motion for Summary Judgment, also states that counsel for Maine Caterers has asserted

The record shows that Respondent in the underlying representation case (1--RC--16143) raised the same arguments; and that the Regional Director for Region 1 in his Decision and Direction of Election on April 5, 1979, determined that Maine Caterers and Maine, Inc., constituted a single employer within the meaning of the Act; that W. H. Maine, president of both corporations, testified in great detail concerning the operations of both corporations, was present throughout the hearing

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continuously that he does not and has not been employed to represent W. H. Maine, Inc. The record shows that counsel initially entered an appearance at the hearing for W. H. Maine, Inc., filed an answer to the complaint on behalf of both W. H. Maine, Inc., and Maine Caterers, entered into unsuccessful settlement negotiations for both; filed a request with the Board on behalf of both for review of the Regional Director's Decision and Direction of Election; and responded to the Motion for Summary Judgment on behalf of both. Moreover, the record further shows that the issue of whether W.H. Maine, Inc., and Maine Caterers constituted a single employer was fully litigated at the hearing; and that Mr. Maine testified at length concerning this issue, and at no point requested time for further testimony or additional witnesses.

while the issue was fully litigated, and had full opportunity to present and cross-examine witnesses; and that the nonsalaried driver salesmen are not accorded that freedom which marks the independent contractor, but rather that Respondent has retained the right to control the means and manner by which the customers of Respondent are serviced. The Regional Director, therefore, concluded that nonsalaried driver-salesmen are employees within the meaning of the Act, and the unit sought was appropriate for collective-bargaining purposes.

On April 24, 1979, Respondent filed with the Board a request for review of the Regional Director's decision; and on May 8, 1979, the Board denied Respondent's request on the grounds that it raised no substantial issues warranting review.

Review of the record establishes that the Union won the election conducted on May 10, 1979, and was certified as bargaining representative on May 18, 1979, by the Regional Director.

The Union requested that Respondent begin collective-bargaining by letters dated June 21, 1979, and January 10 and 30, 1980. Respondent by letter dated February 18, 1980, refused, on the grounds that "Maine Caterers does not recognize [the Union] as the certi-

fied bargaining agent for the independent contractors who operate Maine Caterers vehicles." This objection was originally raised in the underlying representation case, in its Request to the Board for Review of the Regional Director's decision, and in its opposition to the Motion for Summary Judgment.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any

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3 See Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67 (f) and 102.69(c).

issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Maine Caterers, Inc., is a Rhode Island corporation engaged in the distribution and sale of food, beverage, and convenience items at its Rhode Island location. W. H. Maine, Inc. (hereinafter called Maine, Inc.), also a Rhode Island corporation, is engaged in the leasing of catering trucks and routes to driver-salesmen who sell and distribute the products of Maine Caterers. The parties stipulated that Maine Caterers is engaged in commerce in that it has a gross volume in excess of $500,000 per year, and annually receives goods valued in excess of $50,000 directly from suppliers outside the State.

William H. Maine is the president, treasurer, and secretary of Maine Caterers. His brother, Henry Maine, is the vice president. William H. Maine is also the president, vice president, and secretary-treasurer of Maine, Inc. William H. Maine owns all the stock in both corporations.

Neither corporation has a board of directors. The corporations are totally dependent upon each other since the products of Maine Caterers are distributed solely by the trucks of Maine, Inc., and the trucks of Maine, Inc., are leased solely to the driver-salesmen. The trucks owned by Maine, Inc., carry the name "Maine Caterers." The Regional Director found, and we agree, that inasmuch as Maine Caterers and Maine, Inc., have common ownership, common control, common management, and integration of operations, they constitute a single employer within the meaning of the Act. As such, jurisdiction over Maine, Inc., is established by the commerce stipulations entered into by the parties with respect to Maine Caterers. Film Projects, Inc. d/b/a Capitol Theatre, Capitol Rock, Inc., and Monarch Entertainment Bureau, Inc., 231 NLRB 1370, 1374--75 (1977), Marsal Transport, Inc., Salvador Sisneros, d/b/a International Transportation Co., 199 NLRB 689, 691 (1972).

We find, on the basis of the foregoing, the Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert juris-

diction herein.

II. The Labor Organization Involved

Brotherhood of Industrial Caterers is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The Unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All nonsalaried driver-salesmen employed by Maine Caterers, Inc. and W. H. Maine, Inc., at its Warwick, Rhode Island, location, but excluding all salaried driver-salesmen, all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

2. The certification

On May 10, 1979, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 1, designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was

certified as the collective-bargaining representative of the employees in said unit on May 18, 1979, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request to Bargain and Respondent's Refusal

Commencing on or about June 21, 1979, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about February 18, 1980, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since February 18, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth

in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit.

See Mar-Jac Poultry Company, Inc., 136 NLRB 785 (1962); Commerce Company d/b/a Lamar Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; Burnett Construction Company, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Maine Caterers, Inc., and W. H. Maine, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Brotherhood of Industrial Caterers is a labor organization within the meaning of Section 2(5) of the Act.

3. All non salaried driver-salesmen employed by Maine Caterers, Inc., and W. H. Maine, Inc., at its Warwick, Rhode Island, location, but excluding all salaried driver-salesmen, all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since May 18, 1979, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about February 18, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Maine Caterers, Inc., and W. H. Maine, Inc., Warwick, Rhode Island, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Brotherhood of Industrial Caterers as the exclusive bargaining representative of its employees in the following appropriate unit:

> All nonsalaried driver-salesmen employed by Maine Caterers, Inc., and W. H. Maine, Inc., at its Warwick, Rhode Island, location, but excluding all salaried driver-salesmen, all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

defaced, or covered by any other material.

(c) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. August 25, 1980

_____
John H. Fanning Chairman

_____
Howard Jenkins, Jr. Member

_____
John A. Penello Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL RELATIONS BOARD."

D--6706

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Brotherhood of Industrial Caterers as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All nonsalaried driver-salesmen employed at our Warwick, Rhode Island, location, but excluding all salaried driver-salesmen, all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

MAINE CATERERS, INC. AND
W.H. MAINE, INC.

(Employer)

D--6706

Dated----------By----------
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Keystone Building, 12th floor, 99 High Street, Boston, Massachusetts 02110, Telephone 617-223-3313

2. Take the following affirmative action which the Board finds will effectuate policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at 125 Kilvert Street, Warwick, Rhode Island, copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered,

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[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MAINE CATERERS, INC. and
W.H. MAINE, INC.

Employer 1/

and

BROTHERHOOD OF INDUSTRIAL CATERERS

Petitioner

Case No. 1-RC-16,143

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 2/

3. The labor organization involved claim(s) to represent certain employees of the Employer. 3/

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act. 4/

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All non-salaried driver-salesmen employed by Maine Caterers, Inc. and W.H. Maine, Inc., at its Warwick, Rhode Island location but excluding all salaried driver-salesmen 5/, all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

As election by secret ballot shall be

conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately before the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less that 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Brotherhood of Industrial Caterers.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, two copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, Keystone Building, 12th Floor, 99 High St., Boston, MA 02110, on or before April 12, 1979. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of

of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, NW., Washington, D.C. 20570. This request must be received by the Board in Washington by April 18, 1979.

Dated: April 5, 1979
at: Boston, Massachusetts

Robert S. Fuchs
Regional Director,
Region One

1/ The name of the Employer appears as amended at the hearing.

2/ Maine Caterers, Inc. (herein called Maine Caterers) is a Rhode Island corporation engaged in the distribution and sale of food, beverages and convenience items at its Rhode Island location. W.H. Maine, Inc. (herein called Maine, Inc.), also a Rhode Island corporation, is engaged in the lease of catering trucks and routes to driver-salesmen who sell and distribute the products of Maine Caterers. The parties stipulated that Maine Caterers is engaged in commerce where it has an annual gross volume of business in excess of $500,000 and annually receives goods valued in excess of $50,000 directly from suppliers

in Rhode Island who are in turn engaged in interstate commerce and who received these same goods directly from points outside of Rhode Island. The attorney for Maine Caterers, while denying that he represents Maine, Inc., although he initially entered an appearance as its representative, claims that Maine, Inc. does not meet any of the Board's jurisdictional standards. Furthermore, in his post hearing brief, the attorney for Maine Caterers asserts that no finding of a single employer status can be made because Maine, Inc. was denied its due process rights since it was not served with a notice of hearing and not given an opportunity to be represented or to present evidence.

Mr. William H. Maine is the president, treasurer and secretary of Maine Caterers. Mr. William H. Maine's brother, Henry Maine, is the vice president. Mr. William H. Maine is the president, vice president and secretary-treasurer of Maine, Inc. That corporation has no other officers. Mr. William H. Maine owns all the stock of both corporations. Neither corporation has a board of directors. Maine Caterers has its sole place of business at 125 Kilvert Street, Warwick, Rhode Island where it processes and sells its food and beverage items to driver-salesmen for further sale and distribution to industrial customers. The driver-salesmen distribute the products

by catering trucks and equipment owned by Maine, Inc., on routes owned by Maine, Inc. Maine, Inc. has a Cranston, Rhode Island post office box as its address. Henry Maine, while employed by Maine Caterers, solicits customers for Maine, Inc., reviews the cleanliness and general repair of Maine, Inc.'s vehicles, and handles the public relations between Maine, Inc. and its customers. William H. Maine and his brother, Henry, decide which route a driver-salesmen receives. Maine Caterers collects all the truck and route rental fees for Maine, Inc. The trucks and equipment owned by Maine, Inc. are garaged at Maine Caterers' location. There is a single contract which regulates the lease of equipment and customer routes to the driver-salesmen and the purchase of food and beverage by the driver-salesmen for resale to customers. This contract lists Maine Caterers and Maine, Inc. as a single contracting party. The trucks owned by Maine, Inc. carry the name "Maine Caterers." The two corporations are completely dependent upon each other since the products of Maine Caterers are distributed solely in the trucks of Maine, Inc. and the trucks of Maine, are leased solely to the driver-salesmen. Since Maine Caterers and Maine, Inc. have common ownership, common control, common management, interrelationship of operation and are represented to the public as a single enterprise, I find they constitute a single employer within the meaning of the Act. As a single employer,

jurisdiction over Maine, Inc. is established by the commerce stipulations entered in regard to Maine Caterers. Film Projects, Inc. d/b/a Capitol Theatre, Capitol Rock, Inc., and Monarch Entertainment Bureau, Inc., 231 NLRB 1370, 1374-1375. In finding these two corporations to be a single employer, I am not persuaded by the Employer's claim that Maine, Inc. was denied its due process rights by not receiving a formal notice of hearing. William H. Maine, the sole person behind Maine, Inc., was present throughout the hearing. On the first day of the hearing prior to the presentation of any evidence by either party and prior to the amendment of the petition to include Maine, Inc., the Employer's position was that both corporations were separate employers. In support of this claim, William H. Maine testified in great detail concerning the operations of both corporations. When the petition was amended at the hearing to include Maine, Inc., the issue had already been fully litigated. Maine had had an opportunity to present and cross examine witnesses on the issue. And, at no point during the hearing, did Maine indicate that there was any more evidence to present on this issue or request any further time.

3/ The Employer claims the Petitioner is not a labor organization within the meaning of the Act. The Petitioner was formed under the

original name of the Fraternal Order of Caterers in November 1978. At the time of the filing of the instant petition, the name was changed to the Brotherhood of Industrial Caterers. The Petitioner is composed of the non-salaried driver-salesmen employed by the Employer. The Petitioner has officers elected by the membership and exists for the purpose of negotiating with the Employer over rates of pay, hours, working conditions and grievances. The members pay weekly dues and the Petitioner has regular meetings. The officers are in the process of drafting by-laws for the organization. Based on the above, it is found that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act. Advance Industrial Security, Inc., 225 NLRB 151.

4/ The Petitioner seeks to represent a unit of all non-salaried driver-salesmen. The Employer claims the unit is inappropriate in that the non-salaried driver-salesmen are independent contractors and therefore do not meet the definition of employees under Section 2(3) of the Act. The non-salaried driver-salesmen start out as salaried drivers of William Maine. At some point after they are trained in the operation, they enter into a contract with the Employer by which they are given a fully equipped truck and a route of

customers. The driver makes no initial monetary investment to enter into this contract. Once a driver becomes non-salaried, the Employer makes no deductions for income taxes or social security taxes. The driver receives no vacation, pension or other benefits. The driver pays for his own health insurance although he can purchase Blue Cross coverage through the Employer's group plan. The income of a driver is the difference between the amount he pays to Maine Caterers for the food and other items and the amount for which he sells the item to the customer. The driver bears any loss for unsold goods or theft. In addition to the daily cost of the food, the driver also pays a daily rental fee to cover lease of the truck and the customer route. The driver must pay all taxes except property taxes and registration fees on the trucks. The Employer maintains the cost of insuring vehicles. The drivers pay for the catering licenses which are issued in the name of the Employer.

The driver is free to solicit new customers but any new customer becomes part of the route the driver services which is the property of the Employer. The Employer retains the right to assign customers to routes. Thus, there have been occasions where a driver has solicited a new customer but that new customer was assigned

to another driver's route. When the contract is terminated the driver cannot sell the route or customers. The contract also forbids a driver from servicing any customers not belonging to the Employer during the term of the contract and forbids a driver from engaging in industrial catering anywhere in the State of Rhode Island for a period of two years after the termination of the contract. The Employer claims the drivers are free to service the customers as they wish. However, the contract states a driver cannot deviate from a route or omit services. The contract also requires the driver to cover and serve the entire route on business days of the week except legal holidays.

The contract requires the driver to purchase all products from the Employer regardless of the fact that he may be able to buy the product elsewhere at a lower price. If a driver wishes to carry an item not sold by the Employer, he must receive permission from the Employer. The Employer claims the driver is free to set his own prices for sale to the customer. However, the contract states the driver shall sell the products at reasonable competitive prices as suggested by the Employer. The Employer has printed menus with prices which are often given to the customers and posted on the trucks. There was testimony by

a driver that he was told by Henry Maine to reduce a price to that on the menu when Maine discovered a deviation. Since a customer may be served by more than one driver in the course of a day, the Employer has an interest in keeping prices uniform.

The vehicle and equipment remain the property of the Employer at all times. Although the Employer claims a driver can, with permission, take a vehicle home, the contract states that the vehicle shall be used only in the service of the Employer in performance of the contract and for no other purpose. If a driver wants to use the vehicle for anything other than his scheduled route, he must pay an additional rental fee. The driver is required under the contract to keep the vehicle in good repair at his own expense. The driver is also required to keep the truck and equipment clean and sanitary and to comply with any public laws, ordinances, and regulations covering the distribution of food. Henry Maine has periodically accompanied drivers on their routes, told them how to display items and present themselves to customers. At times, he visits customers either on his own initiative or on request of the driver to settle any problems or solicit new customers. Although the trucks and menus carry the name of the Employer, the drivers

are not required to wear uniforms. When a driver wishes to take time off, he has the responsibility for finding and paying his substitute. The contract can be terminated without cause on 30 days notice and for cause without notice.

Since the non-salaried driver-salesmen make no substantial investment in equipment or a route, their contracts can be terminated immediately with cause, they are required to buy all products from the Employer at prices set by the Employer, they are not free to use the equipment for their own use, their prices to the customer are at least strongly suggested by the Employer, the drivers cannot work for themselves or anyone else while under contract and the Employer generally oversees the drivers' dealings with the customers, I find the Employer has retained the right to control the manner and means by which the customers are serviced. The non-salaried driver salesmen are therefore found to be employees under the Act. Okeh Caterers; Jameson, Inc.; and Frumento, Inc., 179 NLRB 535, 536-537; Lorenz-Schneider Co., Inc., 203 NLRB 217; Land O'Lakes, Inc., 204 NLRB 519. There is approximately 11 driver salesmen in the unit found appropriate.

5/ Based on the stipulation of the parties the salaried driver-salesmen are excluded

from the unit found appropriate.

Opposition

Office - Supreme Court, U.S.
FILED
JAN 18 1982
ALEXANDER L. STEVAS
CLERK

No. 81-925

In the Supreme Court of the United States

OCTOBER TERM, 1981

MAINE CATERERS, INC. AND W.H. MAINE, INC.,
PETITIONERS
v.
NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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QUESTION PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that the Company's driver-salesmen are employees, rather than independent contractors.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-925

MAINE CATERERS, INC. AND W.H. MAINE, INC.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 654 F. 2d 131. The decision and order of the National Labor Relations Board in the unfair labor practice proceeding (Pet. App. 9a-23a) is reported at 251 N.L.R.B. 505, and the Regional Director's Decision and Direction of Election in the related representation proceeding (Pet. App. 27a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 8a) was entered on July 16, 1981. On October 9, 1981, Justice Brennan granted an extension of time within which to file the petition to and including November 15, 1981. The petition

for a writ of certiorari was filed on November 14, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant portions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.* ("the Act"), are set forth at pages 3-4 of the petition.

STATEMENT

1. On January 22, 1979, the Brotherhood of Industrial Caterers ("the Union") filed a petition for an election in a unit composed of the nonsalaried driver-salesmen employed by Maine Caterers, Inc. and W.H. Maine, Inc. (referred to individually as "Maine Caterers" and "Maine, Inc.," respectively, and collectively as "the Company") (Pet. App. 27a-28a). The Company opposed the petition primarily on the ground that the driver-salesmen were independent contractors rather than employees, and a hearing was ordered on the issue of the status of the driver-salemen (Pet. App. 27a-28a, 35a).[1] At the hearing, the following evidence was adduced.

Maine Caterers is engaged in the sale and distribution of food, beverages, and convenience items which it sells exclusively to its driver-salesmen. Maine, Inc. is engaged in the leasing of catering trucks and customer routes to the driver-salesmen who sell the products of Maine Caterers (Pet. App. 31a-33a). William H. Maine owns all the stock of

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[1]Before the Board, the Company also argued that Maine Caterers and Maine, Inc. were not a single employer, that Maine, Inc. did not meet the Board's discretionary jurisdictional standard, and that the Union was not a labor organization within the meaning of Section 2(5) of the Act (29 U.S.C. 152(5)) (Pet. App. 31a-35a). The Company did not raise these issues in the court of appeals.

Maine Caterers and Maine, Inc., and together with his brother, Henry Maine, runs the two companies (Pet. App. 32a).

The Company's driver-salesmen stop at industrial plants at specified times and sell their products to workers on coffee or lunch breaks (Pet. App. 32a-33a; Tr. 184).[2] The driver-salesmen begin servicing their customer routes by working as salaried drivers (Pet. App. 35a). They then go through a period of training with Henry Maine, who shows them "the exact procedures" for running a catering truck. He first shows the drivers the route sheet and tells them the specific times to be at particular stops. He also shows the drivers how to display their goods, how to keep their trucks filled, how they should present themselves to customers, and how they should drive (Tr. 107-108, 160, 185, 204, 307-308, 405).

After the training is completed and William or Henry Maine determines that a driver is able to handle a route, the driver enters into a contract with the Company (Pet. App. 35a). The contract provides that the driver agrees to pay a daily rental fee in return for a fully equipped catering truck and customer route (Pet. App. 35a-36a; JX 1, at 3-4). The driver no longer receives a salary, and his income is the difference between the amount he pays the Company for the food and other items and the amount at which he sells them to customers (Pet. App. 36a; Tr. 272). The driver bears the risk of loss due to unsold goods or theft (Pet. App. 36a). The Company makes no deductions for income taxes or social security taxes, and the drivers receives no vacation, pension, or other benefits (Pet. App. 36a).

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[2] "Tr." refers to the transcript of the hearing before the Hearing Officer in the Board representation proceeding; "JX" refers to the exhibit jointly offered by the Union and the Company.

Once a driver signs a contract and takes over a route, he is free to solicit new customer stops which become a part of the route and the property of the Company (Pet. App. 36a). On occasion, a driver has solicited a new customer whom the Company has assigned to another driver's route when Henry Maine felt that the first driver could not properly handle the customer on his route (Pet. App. 36a-37a). Henry Maine also solicits new customers who are then assigned to a driver's route, and coordinates the time of the customers' stops with the driver's schedule (Pet. App. 36a; Tr. 191, 298-299). When the contract is terminated, the driver cannot sell the route or any of the customers (Pet. App. 37a).

The contract provides that a driver cannot deviate from his route or omit services and requires that the driver must cover and serve the entire route on all business days (Pet. App. 37a). When the driver wants to take time off, he has the responsibility for finding and paying his substitute (Pet. App. 39a). The contract prohibits a driver from servicing any customer not belonging to the Company (Pet. App. 37a). The contract further states that the Company may terminate the contract immediately, without notice, if the driver-salesman defaults on any contract obligation; additionally, the contract may be terminated without cause upon 30 days' written notice (Pet. App. 39a). The contract also forbids any driver from engaging in industrial catering in the State of Rhode Island for two years after termination of the contract (Pet. App. 37a).

In addition to requiring that the driver-salesman serve only the customers of the Company, the contract requires the driver "to purchase all * * * food, beverages, supplies and sundries to be sold and supplied to * * * route customers" from the Company (JX 1, at 2). As a result, drivers are required to buy all their supplies from the Company even though they may be able to obtain them elsewhere at a

lower price. If a driver wishes to carry an item not supplied by the Company, he may do so only after he receives the Company's permission (Pet. App. 37a). The contract also provides that the driver "shall sell the products purchased by him at reasonable competitive prices as suggested by [the Company] from time to time" (Pet. App. 37a; JX 1, at 2). To this end, the Company has printed menus with prices which are distributed to customers and posted on the trucks (Pet. App. 37a). Since a customer may be served by more than one driver-saleman during the course of a day, the Company is particularly interested in keeping prices uniform, and, on at least one occasion, Henry Maine has told a driver to reduce a price that he was charging on an item to that listed on the menu (Pet. App. 37a-38a).

The catering truck and the equipment on it remain the property of Maine, Inc., and the trucks carry the name "Maine Caterers" on them (Pet. App. 38a). The contract states that the truck "shall be used only in the service of the [Company] in the performance" of the driver's contract with the Company (Pet. App. 38a; JX 1, at 3). At the completion of his route, the driver must leave his truck at the Company's yard (Tr. 188-189, 199, 369). The contract requires the driver to keep the truck in good repair at his own expense, to keep the truck clean and sanitary, and to comply with any public laws, ordinances, and regulations covering the distribution of food (Pet. App. 38a). The driver pays for the catering license, issued in the Company's name, to operate the truck. The Company pays for the cost of insuring the truck, property taxes, and registration fees (Pet. App. 36a).

During the contract term, Henry Maine periodically accompanies the driver on his route. When on the truck, Maine carries the Company's route sheet and checks the driver's stops and their times. He also checks prices which the driver is charging, the condition of the truck and its

cleanliness, how the food is displayed and served, and how the driver presents himself to customers. Maine also visits customers on his own initiative, or at the driver's request, to settle any problems or solicit new business (Pet. App. 38a).

Based on these facts, the Board found that the Company's driver-salesmen were employees and ordered an election (Pet. App. 27a-31a). On May 10, 1980, an election was held in which driver-salesmen voted nine to one in favor of the Union. In the absence of any objections to the conduct of the election, the Union was certified as the employees' collective bargaining representative on May 18 (Pet. App. 2a, 17a-18a).

After being certified by the Board, the Union requested the Company to bargain, and the Company refused (Pet. App. 18a). Thereafter, the Union filed unfair labor practice charges with the Board. The Company raised as a defense the same contentions raised during the representation proceeding, and, following summary judgment proceedings, the Board found that the Company violated Section 8(a)(5) and (1) (29 U.S.C. 158(a)(5) and (1)) of the Act by refusing to bargain with the certified Union (Pet. App. 14a-23a).

2. The court of appeals affirmed the Board and held that the Company's drivers were employees (Pet. App. 1a). In reaching this conclusion, the court found that the Company retained the right to control not only the results sought but also the means by which the results were achieved (Pet. App. 3a-4a), that the drivers had no proprietary interest in their routes (Pet. App. 4a), and that the drivers' risk of loss or opportunity for profit was limited because the drivers' control over the prices of the items which they sold was limited and because they did not own their own trucks (Pet. App. 4a-6a).

ARGUMENT

This Court established in *NLRB* v. *United Insurance Co.*, 390 U.S. 254, 256 (1968), that common-law agency principles are to be used in distinguishing between employees and independent contractors under the Act. It cautioned, however, that "[t]here are innumerable situations * * * where it is difficult to say whether a particular individual is an employee or an independent contractor" and that in such cases "there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive" (*id.* at 258). The Court added that the Board's determinations as to independent contractor status "should not be set aside just because a court would, as an original matter, decide the case the other way"; rather, "the Board's choice between two fairly conflicting views" should be sustained. 390 U.S. at 260.

The court of appeals correctly applied the *United Insurance* principles in declining to disturb the Board's finding that an employer-employee relationship existed between petitioner and its driver-salesmen. Review of this fact-bound issue by this Court is unwarranted. *United Insurance Co., supra; Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

The cases upon which petitioners rely (Pet. 9) for their contention that the decision here creates a conflict among the circuits are factually distinguishable. Thus, in *NLRB* v. *A. Duie Pyle, Inc.*, 606 F. 2d 379 (3d Cir. 1979), the owner-operators in question owned their own trucks, were free to work or not to work for the employer, chose their own routes and times of operation, were free to work for other companies, and were not supervised in any way while hauling loads for the employer. In *Frito-Lay, Inc.* v. *NLRB*, 385 F. 2d 180, 184-185 (7th Cir. 1967), the drivers owned

their own trucks and routes, were not required to work any particular hours or particular days, and could resell the employer's product at any prices they wanted to set. In *Local 777, Democratic Union Organizing Committee* v. *NLRB*, 603 F. 2d 862, 891, 897-899 (D.C. Cir. 1979) (on denial of petition for rehearing), the cab drivers were " 'not required to operate in any prescribed manner, to accept any calls or dispatches * * * [and are] on their own once they leave the garage and are free to prospect for fares when and where they choose . . . '." In *NLRB* v. *Amber Delivery Service, Inc.*, 651 F. 2d 57 (1st Cir. 1981), the court of appeals upheld the Board's finding of employee status even though the drivers in question owned their own trucks. Although the Company contends that its drivers, unlike Amber's, have authority to set prices, the court of appeals correctly noted that the Company drivers, because their "control of prices was limited" (Pet. App. 5a), had no more opportunity to maximize profit than did the employees in *Amber*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1982

DOJ-1982-01